

# eMagazine



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**CS VJ Balakrishnan**

Chairman,  
Mysore Chapter

**-: Editorial Team:-**

**CS Vijaya Rao**

**CS Sherene**

**CS Pracheta M**

**CS Phani Datta**

**CS Ajay Madhaiah**

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Dear Professional Colleagues,

Greetings!

It's a season of celebration!! We as a part of the ICS fraternity take immense pride in celebrating the Golden Jubilee of our profession on 4<sup>th</sup> October, 2017 after its recognition in the year 1968. Through the eMagazine I convey my wishes to all of you.

During the month of September 2017, Mysore Chapter had conducted five career awareness programs in Mysore & Coorg districts. The program benefited around 500 students. On 15<sup>th</sup> September, 2017 Mysore Chapter in association with the University of Mysore conducted a one day workshop on "New Regimes of Indian Business Environment" for lecturers of colleges affiliated to the University of Mysore. More than 200 lecturers from various colleges attended the Program.

I wish all of you a very Happy Diwali.

Thank you.

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# Chapter Activities

## CAREER AWARENESS PROGRAM

Chapter has conducted five career awareness programs during the month. The details are as follows.

S No	Date	College Name	Addressed By	No. of Participants
1	07.09.2017	Government First Grade College, KRS	N. Dhanabal	70
2	08.09.2017	Cauvery Degree College, Gonikoppal	CSManjunath S	120
3	08.09.2017	Cauvery Degree College, Virajpet	CSManjunath S	140
4	08.09.2017	Government First Grade College, Virajpet	CSManjunath S	120
5	27.09.2017	Maharani's Womens College	CSManjunath S	60

## ONE DAY WORKSHOP ON NEW REGIMES OF INDIAN BUSINESS ENVIRONMENT



Chapter in association with Department of Studies in Commerce, University of Mysore organized a one day workshop of “New Regimes of Indian Business Environment” for the UG/ PG Commerce and Management teachers of the Colleges under the University of Mysore on 15<sup>th</sup> September, 2017. Dr. N R Parasuraman, Director, SDM Institute of Management was the Chief Guest for the program. CS Ganapathi G M., Chairman, ICSI-SIRC was the guest of honour. Prof. G Kotreshwar, Professor of Commerce delivered the inaugural address. CS Pracheta M., Vice Chairperson of Mysore Chapter welcomed the guest. CS Veerash M.J, Treasurer of Mysore Chapter delivered the vote of thanks.



The first session in the program was handled by CSManjunath S, Secretary of Mysore Chapter in the topic “New Concepts in Companies Act 2013”. CA Shreeharsha, Practising Chartered Accountant from Bengaluru handled in the topic GST and its Implications during the second session.

The program ended with a panel discussion on the topic GST and Companies Act 2013 . Prof. G Kotreshwar, Department of Commerce, Prof. D Anand, Department of Management, Prof. D.S. Leelavathi, Department of Economics, CA Shreeharsha, Practising Chartered Accountant and CS Veerash M.J., Practising Company Secretary were the panel members. The session was attended by more than 240 lecturers from various colleges in and around Mysore.





## Analysis on the Provision of Section 164(2)(A) of the Companies ACT, 2013 within the Spirit of Law

The Ministry of Corporate Affairs (MCA) has recently published a list of disqualified directors under Section 164(2) (a) of the Companies Act, 2013, which has caused mayhem in the Corporate world without understanding who will be impacted because of this and who will not. As per my understanding I am trying to focus on the issue and on the concerned stakeholders on which it impacts.

This issue has arisen due to the applicability of the provisions of Section 164(2)(a) to the private companies also by making it applicable for all companies with effect from the commencement of the Companies Act, 2013 i.e. 01st April, 2014, which was not the situation for private companies in earlier law of Companies Act, 1956. There is no change in applicability of this provision for public companies. The position for public companies is same in the new law as it was in earlier law except the consequence of defaults (i.e. Penalties and Vacation provisions). The origin of dispute is with reference to the private companies. Hence, this write up deals with the impact on private companies only. All the discussion below is contemplated keeping in the view of private companies.

### Background

**Section 164** provides various grounds of disqualification of directors in a company out of which one of the most highlighted and debating ground these days due to MCA's recent move is disqualification of directors under Section 164(2)(a) because of non-filing of annual returns and financial statements by a company for any continuous period of three financial years. Situation became more complicated after MCA's further announcement consequent upon its publishing the list of disqualified directors, that such listed disqualified directors cannot make filing of any document with MCA as the same shall be summarily rejected.

This move of MCA has given rise to a debate that:

1. Whether MCA has made effective the provisions of Section 164(2)(a) retrospectively?
2. Whether Section 164(2)(a) is applicable to private companies retrospectively?
3. What, if all directors have been listed as disqualified and ineligible for filing any document with MCA?

This article deals with this issue in detail. Before delving in the saddle of such questions, let us look into the provisions, circulars and Case law relevant to the above issue as follows:

### Section 164(2)(a) of the Companies Act, 2013:



**Section 164 "(2) No person who is or has been a director of a company which**

**(a) Has not filed financial statements or annual returns for any CONTINUOUS PERIOD of three financial years; or**

**(b).....,**

**Shall be eligible to be re-appointed as a director of that company or appointed in other company for a period of five years from the date on which the said company fails to do so."**

There has to be a default of non-filing for **continuous period** of three financial years. To understand this better, we may split this provision into two elements:

1. One is **default in filing** of financial statements and annual returns; and
2. The other is **Continuous** period of three financial years.

Both above elements are required together to fall into the provision of disqualification under Section 164(2) (a). For the first time attracting this provision immediately, there has to be default of filing for the financial year 2014-15 after enactment of this provision. That means, now default has occurred after enactment for only one year. This default may be the first year of continuing default of three years that means for the three continuous financial years 2014-15, 2015-16 and 2016-17; or this default of year 2014-15 might be the third year of continuing default of three years that means continuing default of past two years 2012-13, 2013-14 with year 2014-15 or this default of year 2014-15, might be the second year of default in filing that means past 2013-14 and 2015-16 with year 2014-15 because the continuity of default for three years after enactment of this provision has to be checked.

Once, the default is occurred after commencement of this Act for the financial year 2014-15, then the trigger of provision Sec.164(2)(a) will be on. Hence, now the next element of this provision has to be checked i.e. the **continuity of such default** which may cover the past continuing years for said purpose or future continuing years.

The reason behind it, is there is no specific date mentioned in the provision of Section 164(2) (a), unlike Section 274(1) (g) of the Companies, Act, 1956, hence, the **CONTINUITY OF DEFAULT** in filing of annual accounts may cover continuity of default in past years also for the said purpose. Therefore, in order to prove that this law is not retrospective, MCA has no power to go beyond the financial year 2012-13 backwards because the continuity of default in **three** financial years after enactment cannot go beyond year 2012-13 backwards. In simple words, after 01.04.2014, the continuous period of three years can be reckoned at most from years 2012-13, 2013-14 and 2014-15 onwards only. MCA cannot consider and reckon the period of default made in the financial years before year 2012-13 after enactment of this provision in this specific case.

It is pertinent to note here that all Companies already knew the provision of Section 164(2) (a) and its impact when this law came in force. In other

words, every company including private company knew that this provision has become effective from 01.04.2014 and MCA will check continuous three years default, so any genuine or bonafide company had enough time to escape from this provision by filing Annual Accounts for the F.Y. 2014-15 or onwards. Therefore, to break the continuity of default of three financial years or coming out from this provision, Companies were required to do filing of Financial year 2014-15 and onwards.

The above analysis can also be proved from the notification of Registrar of Companies (RoC), Mumbai dated 13/ 09/ 2017 as below:

*Registrar of Companies (RoC), Mumbai's notifications on 13 September clearly quotes section 164 (2) (a) of the Act and says that directors have been banned because no returns or statements were filed for fiscal years 2013, 2014 and 2015. These directors have been banned from 1 November 2015 to 31 October 2020. The 1 November date is relevant because norms say that companies have to conduct their annual general meeting of shareholders by September and file their returns within another month.*

**Vikram Ahuja vs. Greenstone Investments Pvt. Limited and ors., before NCLT, Mumbai Bench, decided on 22.11.2016.**

This case is giving clarity in interpretation of the provision of Section 164(2). One of the point for discussion and decision in this case before the Hon'ble bench was "whether the disqualification set forth in Section 164(2) (a) r/w 167(1) (a) of the Act 2013 has 'RETROSPECTIVE EFFECT OR NOT';

NCLT held that:

"This provision has to be read as applicable to the situations where non-filing has started, at the most in the past and continuing while this enactment has come into existence and also to future non-filing....."

Therefore, the provisions of Section 164 (2) (a) shall be applicable where the non-filing has started in the past and continuing while this enactment has come to existence and also to the future non-filing. Mere applicability of such provision on continuous default till date **shall not give rise to the question of retrospective or prospective effect.**

If we read this holding of NCLT thoroughly, it is clear in this order that there is no question of retrospective or prospective effect. The lawmaker has used the word continuous period of three years; therefore, **continuity of default should be checked after commencement of this Act from where non-filing has started at the most in the past and continuing and also to the future non-filings.**

**Effective date of provision of Section 274(1)(g) vis-a vis Section 164(2):**

The similar provision of Section 164(2) of Companies Act, 2013 was Section 274(1)(g) of the Companies Act, 1956. The provision of Section 274(1)(g) was enforced by Companies (Amendment) Act, 2000, which was read as under:

***Section 274(1) A person shall not be capable of being appointed as director of a company, if:***

***(a)-(f).....***

***(g) such person has already a director of a public company which-***

***(A) has not filed the annual accounts and annual returns for any continuous three financial years commencing on or after the first day of April, 1999; or***

***(B).....***

However, in the present section 164(2) of the Companies Act, 2013, there is no such date mentioned. Meaning thereby, same is continuous in nature i.e. the defaults prior to introduction of the said Section 164(2) will be considered for the purpose of determining the continuity of default for the period of three financial years.

**Confusion created by MCA's Clarification dated 15.10.2014 and CLSS Scheme, 2014:**

The General Circular 41/2014 dated 15.10.2014 issued by Ministry of Corporate Affairs on the clarification been sought by the Stakeholders that whether the directors of the Companies who have filed their (past) balance sheets or annual returns after 01.04.2014 but before the Company Law Settlement Scheme 2014 (CLSS:2014) [15.08.2014] will get immunity from disqualification under Section 164(2)(a).

As per the said circular, the MCA has clarified that the disqualification will be applicable for the **prospective defaults of such companies directors who have filed their Balance Sheets and Annual returns on or after 01.04.2014 but before CLSS-2014 i.e. before 15.08.2014.**

Further, MCA vide its circular dated 12.08.2014 provides the intention of introducing the scheme of the Company Law Settlement Scheme, 2014. The relevant extracts are as follows:

*In case of defaulting companies which avail of this scheme and file all belated documents, the provision of 164 (2)(a) of the Companies Act, 2013 shall apply only for the prospective defaults, if any, by such companies."*

In view of the above circulars, MCA had given time to all companies to get all past filings from 01.04.2014 till the time CLSS Scheme extended till December, 2014, and those companies which had filed within this time or under CLSS, 2014, MCA had clarified that for those companies the provisions of Section 164(2)(a) of the Companies Act, 2013 shall apply prospectively. The language used in this circular is indirect in relation to the applicability of Section 164(2)(a). Those who comply with these circulars, the provisions of Section 164(2)(a) shall become effective prospectively, means those who do not comply with these circulars, Provisions of Section 164(2)(a) shall become applicable retrospectively. However, this was not the intention of that provision Section 164(2)(a) to make this provision retrospectively for companies. Hence, due to these circulars, lots of confusion regarding effect of this provision is created.

**Conclusion of the above initially raised issues:**

Now, we can conclude the issues raised in the beginning of this write up as follows:

**1. Whether MCA has made effective the provisions of Section 164(2)(a) retrospectively?**

Ans.: MCA has not made effective Section 164(2)(a) retrospectively. But, it appeared from the MCA's circulars came earlier relating to CLSS, 2014, that the recent move of MCA by disqualifying directors of the company under Section 164(2)(a) is having retrospective effect. But it is derived from the recent notification of RoC and NCLT Judgement that MCA has taken the provision on the merit as per the spirit of the law.

## 2. Whether Section 164(2)(a) is applicable to private companies retrospectively?

Ans: No. But in the two exclusive special cases, i.e. for defaults continuing for 2012-13, 2013-14 and 2014-15; and 2013-14, 2014-15 and 2015-16. Authority may consider the past years also within the ambit of the provision as explained above.

## 3. What, if all directors have been listed as disqualified and ineligible for filing any document with MCA?

An application for removal of disqualification of directors shall be made in **Form-10**, after making good the default of non-filing. If all directors are listed disqualified and ineligible for filing any documents with MCA, a Company Secretary of the company may file financial statements and annual accounts and make good the default of company.

However, if there is no Company Secretary in the company, shareholders may appoint a director or in such situation Central Government will appoint a director. Hence, a circular in this regard is expected from MCA. Further, in order to avoid such situation, the upcoming Companies Bill, 2017 is giving time of six months for resolving such issues without immediate vacating office of director under Section 167(1)(a).

P.S. This is just an academic discussion which should be unbiased keeping in mind the soul of law as it is meant and intended. There are other factors also for discussion like vacation of directors under Section 167 connecting with Section 164(2)(a). Some may think that this provision is contradicting but as per my opinion it is just the evolution from the earlier law. This law has become a little stringent but in upcoming Companies Bill, 2017, there is some relaxation from immediate vacation from directorship under Section 167.







## National Housing Bank Housing Finance Company



### **INTRODUCTION:**

One of the Primary needs of any human being is 'House'. A house is where new dreams are born and are nurtured, thus making it one of the most basic needs for survival.

The Hon'ble Prime Minister of India, while presenting the Union Budget for 1987-88 on 28 February 1987 announced the decision to establish the National Housing Bank (NHB) as an apex level institution for housing finance. Following that, the National Housing Bank Bill (91 of 1987) providing the legislative framework for the establishment of NHB was passed by Parliament in the winter session of 1987 and with the assent of the Hon'ble President of India on 23 December 1987, became an Act of Parliament. NHB was set up on 9 July 1988 under the National Housing Bank Act, 1987.

NHB is wholly owned by Reserve Bank of India. NHB has been established with an objective to operate as a principal agency to promote housing finance institutions both at local and regional levels and to provide financial and other support incidental to such institutions and for matters connected therewith. NHB registers, regulates and supervises Housing Finance Company (HFCs).

### **Basics about National Housing Bank:**

- The head office of the National Housing Bank shall be at Bombay or at such other place as the Reserve Bank may, by notification, specify.
- The authorized and paid up capital of the National Housing Bank shall be three hundred and fifty crores of rupees
- The National Housing Bank shall have free access to all such records of any institution which seeks to

avail of any credit facilities from the National Housing Bank and to all such records of any person who seeks to avail of any credit facilities from such institution, the perusal of which may appear to the National Housing Bank to be necessary in connection with the providing of finance or other assistance to such institution or the refinancing of any loan or advance made to such person by that institution.

### ❖ **What is Housing Finance Company?**

A Housing Finance Company is a company registered under the Companies Act, 1956 (1 of 1956) which primarily transacts or has as one of its principal objects, the transacting of the business of providing finance for housing, whether directly or indirectly.

- ❖ For commencing the housing finance business, an HFC is required to have the **following in addition to the requirements** under the Companies Act, 2013:

1. Certificate of registration from NHB
2. Minimum net owned fund of Rs. 1000 lakhs ( w.e.f. 01.04.2014)

### ❖ **Type of HFC**

HFCs are categorized in terms of the type of liabilities, by NHB, into Deposit and Non-Deposit accepting HFCs and are issued Certificate of Registration accordingly.

### ❖ **Condition for acceptance of deposit by HFC**



Companies commencing the business of housing finance can accept public deposits only after:

- a. Obtaining certificate of registration from NHB valid for acceptance of deposits; and
- b. Having minimum net owned funds (NOF) of rupees ten crores or more.

❖ **Ceiling on acceptance of deposit by HFC**

- HFCs having credit rating from approved credit rating agencies not below 'A' and complying with all prudential norms requirements can accept deposit not exceeding five times of its net owned fund.
- HFCs having no credit rating can accept deposit only upto two times of its net owned fund or rupees ten crores whichever is lower provided such HFC complies with all prudential norms and also has capital adequacy ratio of not less than fifteen percent as per the last audited balance sheet.

❖ **Ceiling on the rate of interest which can be offered by an HFC on public deposits**

On and from 6<sup>th</sup> July, 2007 no housing finance company shall invite or accept or renew any public deposit at a rate of interest exceeding twelve and half per cent per annum such interest being payable or compounded at rests which should not be shorter than monthly rests.

❖ **HFCs are doing functions similar to banks as banks also provide housing loans. What is difference between banks & HFCs?**



HFCs lend and make investments and hence their activities are akin to that of banks. However, there are a few differences as given below:

- (i) HFCs cannot accept demand deposits;
- (ii) HFCs do not form part of the payment and settlement system and cannot issue cheques drawn on itself;

- (iii) Deposit insurance facility of Deposit Insurance and Credit Guarantee Corporation is not available to depositors of HFCs, unlike in case of banks.

**FUTURE OF HOUSING FINANCE COMPANIES (HFC):**

According to the report of Technical group on Urban Housing shortage in India (2012- 17), India will need 18.8 million housing units in the city alone out of which more than 95% are in Economically Weaker Section/Lower Income Group.

The above projection by NHB makes it clear that in the times to come there is a huge scope for HFCs to grow and the trend shall be bullish.

**REQUIREMENTS FOR REGISTRATION WITH NHB:**

A Company registered under the Companies Act, 2013 and desirous of commencing business of a housing finance institution, should comply with the following-

- (i) either it should primarily transacts or has as one of its principal objects of transacting the business of providing finance for housing, whether directly or indirectly; and
- (ii) it should have a minimum net owned fund of Rs. 10 crore.

NHB, after its satisfaction on the fulfillment of following conditions (given below) provided under sub-section (4) of Section 29A of the National Housing Bank Act, 1987 by a company, may grant a Certificate of Registration.

- (i) HFC is or shall be in a position to pay its present or future depositors in full as and when their claims accrue;
- (ii) Affairs of the HFC are not being or are not likely to be conducted in a manner detrimental to the interest of its present or future depositors;
- (iii) General character of the management or the proposed management of the HFC shall not

be prejudicial to the public interest or to the interests of its depositors;

- (iv) HFC has adequate capital structure and earning prospects;
- (v) Public interest shall be served by the grant of certificate of registration to the HFC to commence or carry on the business in India;
- (vi) Grant of certificate of registration shall not be prejudicial to the operation and growth of the housing finance sector of the country; and
- (vii) Any other condition, fulfillment of which in the opinion of the NHB, shall be necessary to ensure that the commencement of or carrying on the business in India by a HFC shall not be prejudicial to the public interest or in the interests of the depositors.

❖ **Condition to be satisfied by the HFC u/s 29A:**

- (a) that housing finance institution is or shall be in a position to pay its present or future depositors in full as and when their claims accrue;
- (b) that the affairs of the housing finance institution are not being or are not likely to be conducted in a manner detrimental to the interest of its present or future depositors;
- (c) that the general character of the management or the proposed management of the housing finance institution shall not be prejudicial to the public interest or the interests of its depositors;
- (d) that the housing finance institution has adequate capital structure and earning prospects;
- (e) that the public interest shall be served by the grant of certificate of registration to the housing finance institution to commence or to carry on the business in India;
- (f) that the grant of certificate of registration shall not be prejudicial to the operation and growth of the housing finance sector of the country; and

(g) any other condition, fulfillment of which in the opinion of the National Housing Bank, shall be necessary to ensure that the commencement of or carrying on the business in India by a housing finance institution shall not be prejudicial to the public interest or in the interests of the depositors.

❖ **Process of filing of Application:**

The applicant company is required to submit a physical copy of the application (in duplicate) along with the essentials documents to the Head Office of the National Housing Bank. Further, Company is also required to attach a Demand Draft for Rs. 10,000 favoring National Housing Bank payable at New Delhi.

❖ **What are the provisions for regulation of HFCs under the National Housing Bank Act, 1987?**

The provisions for regulation of the HFCs as provided under the NHB Act, 1987 are:

- Requirement of Registration and Net Owned Fund
- Maintenance of percentage of assets in specified securities
- Creation of Reserve Fund by the HFCs
- Regulation or prohibition of issue of prospectus or advertisement soliciting deposits
- Determination of Prudential Norms for HFCs
- Collection of information as to deposits and to give directions
- Issue of directions to the auditors of the HFCs relating to financial statements and disclosure requirements
- Prohibition of acceptance of deposits and alienation of assets
- Penalty for violation of the provisions of the Act or the directions issued thereunder. Filing of winding up petition against erring HFCs.

**Maintenance of percentage of ASSETS:**

Every housing finance Company shall invest and continue to invest in India in unencumbered approved securities, valued at a price not exceeding the current market price of such securities, an amount which, at the close of business on any day, shall not be less than five per cent. or such higher

percentage not exceeding twenty-five percent. as the National Housing Bank may, from time to time and by notification, specify, of the deposits outstanding at the close of business on the last working day of the second preceding quarter

**Return:**

Every such housing finance Company to furnish a return to it in such form, in such a manner and for such period as may be specified by the National Housing Bank.

**RESERVE FUND:**

Every housing finance institution which is a company shall create a reserve fund and transfer therein a sum **not less than twenty per cent. of its net profit** every year as disclosed in the profit and loss account and before any dividend is declared

**Appropriation of Fund:**

Any appropriation of funds from reserve fund shall be reported to the National Housing Bank **within twenty-one days** from the date of such withdrawal.

**Returns:**

The returns/ statements required to be submitted by the HFCs to NHB are enumerated below:

- Annual Return
- Half-yearly Return on Prudential Norms
- Quarterly Return on maintenance of Liquid Assets

- Auditor's Certificate on annual basis certifying the capability of the HFC to repay deposits
- Copy of financial statements/ Annual Report
- Returns on changes pertaining to address of the registered office of the HFC, its Directors etc.
- Filing a copy of the advertisement soliciting Public Deposits or statement in lieu thereof

**BOARD REPORT:**

In every report of the Board of Directors *there shall be included, the following particulars or information, namely*

- *The total number of accounts of public deposit of the housing finance company which have not been claimed by the depositors or not paid by the housing finance company after the date on which the deposit became due for re-payment; and*
- *The total amounts due under such accounts remaining unclaimed or unpaid beyond the dates referred to in clause (a) as aforesaid.*

**Constitution of Audit Committee :**

A housing finance company having assets of Rs 50 crore and above as per its last audited balance sheet shall constitute an Audit Committee consisting of not less than three non-executive Directors of the Board





When choosing between airlines for any given flight, there are a number of factors to consider. If comfort is important to you – and it certainly should be – then you should certainly compare the type of seat available on each carrier flying that route. It may be easy to select seats if you are a regular air traveler. This work of choosing a better seat in Flights can be done easily with the help of SEATGURU ([www.seatguru.com](http://www.seatguru.com))

Seatguru is a website maintained by tripadvisor. This site helps you to select best seats on the flights. The site gives you the seat map along with the description about the seat. Along with the seat details, it also provides basic information about the flight, amenities provided by it, photos of the flight posted by the travelers and travelers' reviews.

The user has to punch in the details of the flight like service provider, flight number and date of travel. If you are not aware of the flight number then, click on the link 'I don't know my flight number' and

type in the starting point and the destination details. Then click 'enter', now the site itself gives you the flight details of that particular service provider.

Once the flight details are typed, the site will display the seat map of the aircraft. Now you can select the seat according to your comfort level. The suggestions by the site will be as follows:



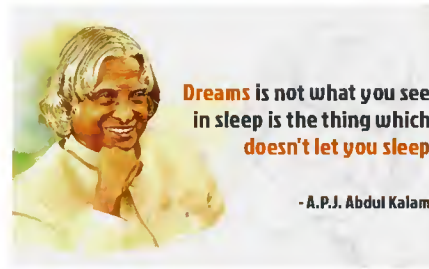
Apart from advice on seat, the site also has tab for renting cars. This will be handy when you are on vacation. But the price mentioned in the site are in terms of USDollors.

## Words Worth Million

Happiness is when what you think, what you say, and what you do are in harmony.”

-Mahatma Gandhi





## The Man Who Taught Us to Be Human First

**As October 15<sup>th</sup> is the birthday of our People's President A. P. J. Abdul Kalam let us remember him**

Avul Pakir Jainulabdeen Abdul Kalam usually referred as A. P. J Abdul Kalam was the 11th President of India for the term 2002 to 2007. Popularly known as the People's President he was the chief brain behind India's attainment of the nuclear status in the global arena and was known as the 'Missile Man of India' for his work on development of ballistic missiles and space rocket technology.

There are numerous experiences of people who worked by the side of this man who has been deeply motivated by his honest care, affection and thoughtfulness. It was once, under a very tight project launch a scientist working under him requested an early leave as he was supposed to take his son to an exhibition. Engrossed in his work, it was three hours late when the scientist realised that he forgot keeping his parental duties. Going back home with a guilty heart he was amazed to know that his son was not at home. Instead he was at his exhibition. It was Dr Kalam, who on noticing that the scientist was not leaving his work, thought to keep his father's promise to the child by taking him to the exhibition personally. It clearly shows

how much he valued his men because it is men who makes or breaks an organisation.

### **Lesser Known facts about the missile man of India**

1. Dr.APJ Abdul Kalam had Physics and Maths as his favourite subjects
2. Kalam missed an opportunity to become a fighter pilot for the Indian Air force. He was on the ninth spot on the list, and there were only eight openings. The first eight shortlisted candidates were recruited
3. Interestingly, he was also honored with doctorates from 40 universities
4. Kalam's visit to Switzerland is commemorated as Science Day in the country
6. Kalam followed only one cricketer on his Twitter account – VVSLaxman. Kalam followed a total of 38 people on this social media account.
7. Kalam would get up at 4:00 am to take his mathematics lessons





## Takeover Code 2011, Concept Appraisal, Procedures and Disclosures (PART -1)

### Introduction

This document offers ephemeral cognizance of Takeover Code and concise SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011. A much awaited new **Takeover Code** released by replacing more than a decade old code w.e.f 22<sup>nd</sup> October 2011. To re-examine the prevailing Code, SEBI instituted the Takeover Regulations Advisory Committee (**TRAC**) under the Chairmanship of late CAchuthan (former Presiding Officer of Securities Appellate Tribunal). TRAC had re-written the Takeover Code comprehensively and released its report on 19 July 2010 which was unwrapped for public comments till 31 August 2010. Subsequently, on 28 July 2011, the SEBI Board considered this report and acknowledged most of its recommendations.

It is a landmark step towards growth of capital markets along with M&A landscape and also aligned India with the best practices prevalent globally. The new Code has facilitated inorganic business growth, especially through easier and faster processes and increased measures for transparency and governance. Now we have sum up highlights of the Takeover Code of **1997 and 2011** at glance:

- ❖ Now the Individual Acquirer Shareholding shall also be measured for determining the Open Offer Trigger Points apart from consolidated promoter shareholding as per Regulation 3(3) of SEBI (SAST) Regulations, 2011.
  - ❖ Increment in Offer Size from 20% to 26% instead of TRAC Recommendation of 100% although it's a good move from domestic acquirer's point of view on account of lack of proper bank funding options available in India.
  - ❖ Persons acting in concert means persons who, with a common objective or purpose of acquisition of shares or voting rights in, or exercising control over a target company, pursuant to an agreement or understanding, formal or informal, directly or indirectly co-operate for acquisition of shares or voting rights in, or exercise of control over the target company
  - ❖ New Provisions in case of surge in shareholding beyond the maximum allowable non-public shareholding due to Open Offer as under:
    - Burden on the acquirer to bring down the non-public shareholding to the level quantified and within the time permitted under Securities Contract (Regulation) Rules, 1957;
    - Prohibition to make a voluntary delisting offer under SEBI (Delisting of Equity Shares) Regulations, 2009, unless a period of twelve months has elapsed from the date of the completion of the offer period.
- ❖ Upswing in Preliminary Threshold Limit provided for Open Offer requirement has been enlarged from 15% to 25% of the voting rights of the Target Company.
  - ❖ Creeping Acquisition Limit elevated from 15%-55% to 25%-75% and will be a sole and clear creeping acquisition bracket and this will be offered to all persons holding 25% or more but up to 75% i.e. maximum endurable non-public holding shall be eligible for creeping acquisition of 5% each financial year.

- ❖ SEBI has also recognized the TRAC Recommendation of scuffling the non-compete fee or control premium so **abolition of Non-compete fees**. Any amount paid to the Promoters/ Sellers whether as contemplation, non-compete fee or control premium or otherwise, shall be added in Offer Price and hence public shareholders shall be given offer at the highest of such prices.
- ❖ A new definition of Control has been introduced in the new Regulation which is similar to recommendation of TRAC Report with exclusion that the word “Ability” has been disconnected.
- ❖ No Exemption in case of acquisition from other contending acquirer
- ❖ For determining the frequency of trading in shares, the trading turnover during the 12 months preceding the month in which the Public Announcement is made will be considered. Further, the volume of trading for frequently traded company increase from 5% to 10% to have a more realistic picture.
- ❖ New Definitions of “Enterprise Value”, “Volume weighted average market price”, and “Volume weighted average price” Announced.
- ❖ New Formats Announced for PA, LOO, and Disclosures, Exemptions, Recommendation on the Open Offer by the Board of Directors and so on.
- ❖ The detailed concept of voluntary open offer has been separately dealt in the SEBI (SAST) Regulations, 2011. In case of voluntary open offer, the offer size may be of 10% or more of the voting rights at the will of the Acquirer.
- ❖ The New Regulations endorses comprehensive provisions connecting to Incidental Acquisitions which is a welcome move as there was quite confusion and also define the circumstances which will be reasoned as Indirect Acquisition.

- ❖ A new term “encumbrance”, for the purpose of determining the control over securities held by acquirer, has been incorporated which includes a pledge, lien or any such transaction, by whatever name called. However the given term was further elaborated by SEBI with its further notifications by including few more terms like securities held by acquirer under Power of Attorney (POA) format and Non – Disposable Undertaking (NDU) arrangement.

A recommendation on the offer by the Board of Target Company has also been made compulsory and such recommendations is required to be published at least two working days before the commencement of the tendering period in the same newspapers where the public announcement of the open offer was published, and simultaneously, a copy of the same shall be also sent to SEBI, designated Stock Exchange(s) where the said securities is listed and traded & Manager to the Offer.

- ✓ Revision in SEBI fees to be given while submitting the draft letter of offer.
- ✓ Provision relating to Exemption from Open Offer has been modified.

Further upon acquisition of threshold limit of securities held by various category of acquirer would be required to carry out the obligations as set out in the regulation and failing which the person would be liable for action in terms of penal clause(s) of this regulation and SEBI Act.

Other substantial amendments concurrently with the amendment in SEBI (SAST) Regulations, 2011, the format of disclosure of shareholding as provided under Clause 35 of the Listing Agreement in respect of securities (including shares, warrants, convertible securities) of persons belonging to the category “Promoter and Promoter Group”.

**To be continued**



## **Conundrums of Reverse Charge Mechanism under GST Impact of 38/2017 CTR Dtd: 13.10.2017**

### **Basic Background:**

GST has enabled applicability of Reverse Charge Mechanism (RCM) levy, on Supply of Taxable Goods/ Services on the Recipient rather than Supplier per-se in two categories:

- a. Notified Goods/ Services – Section 9(3) of CGST Act, 2017 & Section 5(3) of IGST Act, 2017
- b. Supply of Taxable Goods/ Services by Un Registered Person to a Registered Person – Section 9(4) of CGST Act, 2017 and Section 5(4) of IGST Act, 2017

### **Relevance of Monetary ceiling:**

Government has stipulated a threshold limit of Rs.5,000/- per day up to which applicability of S9(4) of CGST Act, 2017 has been exempted from applicability of RCM vide Notification 8/2017 CTR dtd:28.06.2017

Conflict exists for interpretation of above threshold limit in terms of its interpretation & applicability. Many accountants raised their practical difficulty in computing the above limit should be considered either on the basis of Bill Date of an expense or Accounting date of an expense. Further, the ceiling amount is considerably low for envisaging the benefit therefrom.

There exists no such threshold limit for the Notified Goods/ Services for applicability of RCM u/s 9(3)

### **Eligibility of ITC for RCM:**

Due date for making the payment of Tax i.e. RCM is linked with Section 39 i.e. filing of the periodical return. Eligibility of the Input Tax credit is as per

Section 2(62) which specifies the credit of GST payable on RCM is also available.

Accordingly, ITC on RCM can be availed in the respective month during which the liability arises. However, care should be taken for applicability of eligibility of ITC as per the restrictions specified in Section 17 of CGST Act, 2017

### **Practical issues for RCM:**

RCM concept under GST has caused hardship to regular traders who are moved from VAT regime to GST. Registrants under Central Excise/ Service Tax are exposed to the concept of RCM. However, following aspects caused undue hardship for acceptance of RCM under GST:

- Identification of Goods/ Services with relevant HSN & SAC
- Identification of Place of Supply for remittance of CGST/ SGST/ IGST
- Identification of Rate of Tax applicable
- Identification of Exemption applicable if any
- Accounting for Purchases along with determination of ITC availability
- Application of Rs.5,000/- threshold limit per day to justify the actual expenses incurred
- Disclosure of RCM related transactions in GST returns
- Determination of Time of Supply for Advance payments vis-à-vis receipt of Goods/ Services and corresponding Invoice
- Issuance of a self-Tax Invoice

### **Relief of RCM u/s9(4):**

Notification No.38/2017 Central Tax (Rate) dtd:13.10.2017 has been issued in the public



interest for “omission” of proviso defining the exemption of Tax payable u/s 9(4) on the basis of Rs.5,000/- threshold limit

The above Notification has provided absolute exemption for applicability of S9(4) upto 31.03.2018. Similar Notification has been issued in IGST Act u/ s5(4)

However, some practical issues arise on account of above Notification as below:

- Whether Notification has authority to give absolute exemption benefit from 01.07.2017 or 13.10.2017
- If a Registered Person has not remitted Tax u/ s9(4) whether relief can be claimed as per above Notification
- What happens in case of Supplies made from 01.10.2017 till 12.10.2017 for which a consolidated Invoice issued on 31.10.2017
- Whether ITC for RCM remittance attracting restriction u/ s17 of CGST Act, 2017 to be considered as eligible or continues to be hit by Section 17. For instance, GST paid for Canteen supplies or Rent-a-Cab service etc.,

Reference to General Rules of construction has to be applied for interpreting the term “Omission” used in the above Notification. Accordingly, all the

Acts or Provisions existing prior to such Repeal or Omission shall be valid and the same shall not be void & null. Accordingly, we need to understand the above situation as below:

- Provisions of RCM u/ s9(4) shall be valid till September 2017
- Eligibility of ITC for restricted credits shall not be available strictly. However, a lenient view can be taken by the Government authorities considering the Omission of its applicability
- For Invoices issued towards the Supplies for made from 01.10.2017 till 12.10.2017 a consolidated invoice issued at the month end shall be entitled for the benefit of Exemption specified as per Notification 08/ 2017 without any monetary limit

**Disclaimer:**

***The above write up is on the interpretation & understanding of the legal provisions made by the author. Readers are suggested to review the legal provisions for having brevity on the contents discussed as above and suggestions for improvement if any can be communicated at [praveen@gella.in](mailto:praveen@gella.in)***



A who is a CS of Bangalore got the secretarial audit of Bank of Baroda in Chennai during April 2018. Will he pay IGST or CGST/ SGST?

Please send your opinion to, [newsletter.icsimysore@gmail.com](mailto:newsletter.icsimysore@gmail.com)

Continued page 19..



## EMPLOYEES AND NON-COMPETE AGREEMENTS

The winding up or liquidation of a company often leaves several parties financially worse off. Creditors of the company, both secured and unsecured, find themselves forced to accept sums far lesser than what is due to them. Parties to whom the company is due to deliver property, such as purchasers of apartments from a real estate development company, stand to lose their life's savings and the promoters and the shareholders of the company, lose almost the entirety of the value of the enterprise. One class of persons which is deeply affected is the workmen and employees of the company being wound up. Not only do they stand to lose their livelihoods, a company going into winding up would not have paid their salaries for a long period of time.

The procedural setup for disbursement of money to creditors, upon the winding up of a company, is referred to as the "waterfall of payments". The stream of money created by liquidation of assets of a company may be understood as flowing down a waterfall with some classes of creditors, entitled to preferential payments, at the top, who have the first right of slaking their thirst and other creditors and investors arrayed along with waterfall in a hierarchy. We examine the movement of the workmen along this waterfall.

### Companies Act

The Companies Act, 1956, and later the Companies Act, 2013, provided the procedure for winding up of companies.

The Companies Act, 1956 as originally passed, provided that a *pari passu* charge in favour of workmen would be deemed to have been created on the security of every secured creditor.

The Act further provided at Section 530 that dues to workmen and employees shall be paid on a preferential basis. However, the position of the workmen on the waterfall was subordinate to the costs, expenses, and fees of the official liquidator and the amounts due to Central, State or Local authorities. Further it was only workmen's dues of up to 12 months that was accorded such preferential status.

However, by way of amendment in 1985, Section 529A came to be inserted, *vide* which another class of preferential payments was created with a *non obstante* clause that had the effect of overriding Section 530, to the extent of altering the hierarchy on the waterfall. Section 529A, having reference to *pari passu* charge created by Section 529 referred above, provided that dues of workmen and debts on which security could not be realized due to the such *pari passu* charge, would have priority notwithstanding any other dues.

A similar arrangement was contemplated under Section 326 and 327 of Companies Act, 2013.

### **Insolvency and Bankruptcy Code, 2016**

The Insolvency and Bankruptcy Code, 2016 changes the situation to some extent. A Secured creditor now has the option of realizing or relinquishing the secured interest and there is no *pari passu* charge in favour of the workmen. The financial call taken by the secured creditor(s) would thus determine the total pool available for distribution between the workmen and the others. However, Section 53 of the Insolvency and Bankruptcy Code provides that, to the extent that any secured interest is relinquished, it would be divided on pro rata basis between the workmen's dues and the secured creditor who has relinquished such secured interest. Hence, while it is evident that an attempt has been made to retain the old system, in providing a choice to the secured creditor, the workmen have been placed at the whims of such secured creditor.

A move that is beneficial to the workmen is that under the bankruptcy code, dues of up to 24 months can be availed on such preferential basis.

The first wave of bankruptcies being processed under the IBC arise largely from the profligate lending of 7-10 years ago and several large lenders are seen to be under collateralized. i.e., the security they have in their favour from the company is vastly inadequate to satisfy their dues. Hence several of them may relinquish such security in situations where the overall assets of the company are larger. However, the economic indices show that credit growth has been low in India in recent quarters. One of the causes mentioned for this development is the stringent norms being put in place by the Reserve Bank of India, we may see that over the coming years, several lenders may be over collateralized. i.e., the security that they obtain may be more than sufficient to satisfy their dues. In such cases the lender would not choose to relinquish the asset but would realize it. As a result the workmen would be entitled only to the smaller share in general pool.



## ***Opinion To Last Month's Brainy Bits***

It is a composite supply. The rate of tax will be that of the principal supply. Hence, the total IGST charged would  $2100 * 12\% = 252$



- **Union minister assures traders of resolving GST related issues**
- **Great interest about India among investors in US: Arun Jaitley**
- **Taxmen to snoop social networking sites to trace black money**
- **Electric vehicle maker Tesla fired hundreds of employees in past week**
- **Export logs 6-month high growth of 25.6% in September**

## **Aadhaar linkage: Telcos use pressure tactics on users**

While the DoT has used an observation by the court as a binding directive, an interim order by the court states that Aadhaar enrolment could not be made mandatory. Also, the manner in which private telecom companies are seeking this Aadhaar linkage is creating much resentment among users.

## **Indian economy on very solid track : IMF chief Lagarde**

Days after the International Monetary Fund lowered its growth forecast for the current and the next year, IMF chief Christine Lagarde said that the Indian economy is on a "very solid track" in the mid-term.

## **NCLT approves withdrawal of RCom, Aircel merger deal**

The National Company Law Tribunal has approved the withdrawal of merger deal between Reliance Communications BSE 5.25 % and Aircel, as per a regulatory firm.

## **Tata-Airtel deal good for both sides, acquirer to gain more: Fitch**

The Tata Tele-Bharti Airtel BSE 7.89 % deal is positive for both the sides as it will help improve the largest telco's credit profile since its coming with no financial burden and minus any asset, said a report today.

## **FinMin may finalise capital infusion plan for PSBs by December**

There are various parameters which are being looked at for capital infusion exercise, including NPA ratio, credit growth, insolvency proceeding etc, sources said, adding that the second quarter result would also give clarity on the capital requirements for the current fiscal.

## **Sebi orders forensic audit of two more companies**

Markets regulator Sebi has ordered a forensic audit of two companies, Jalan Cement Works and Ritman Infra, after finding prima facie evidence of misrepresentation of financials by them.







## Companies Act, 2013

### Updates on Amended Rules

MCA has introduced Companies (Arrests in connection with Investigation by Serious Fraud Investigation Office) Rules, 2017. According to this rule the director, additional director or assistant director of SFIO (**Serious Fraud Investigation Office**) may on the basis of any material in his possession, while investigating the affairs of a company, arrest any person who has been guilty of any offence punishable under section 212 of the act. Written approval of the central government is required to arrest a person in connection with a government company or a foreign company, which is under investigation.

*Companies (Arrests in connection with Investigation by Serious Fraud Investigation Office) Rules, 2017, dated 24th August, 2017.*

MCA has amended companies (Acceptance of deposits) rules, 2014 which is to be known as Companies (Acceptance of Deposits) Second Amendment Rules, 2017. According to which a specified IFSC public company and a private company may accept from its members monies not exceeding one hundred per cent of aggregate of the paid up share capital, free reserves and securities premium account.

Such companies shall file Form DPT-3 to the Registrar.

*Companies (Acceptance of Deposits) Second Amendment Rules, 2017 dated 19th September, 2017.*

MCA has introduced Companies (restriction on number of layers) rules, 2017. According to this new

Rule no company shall have more than two layers of subsidiaries.

*Following classes of companies are exempted from the above rule.*

- A banking company
- A non-banking financial company, which is registered with the Reserve Bank of India and considered as systematically important non-banking financial company by the Reserve Bank of India;
- An insurance company being a company which carries on the business of insurance in accordance with provisions of the Insurance Act, 1938 and the Insurance Regulatory Development Authority Act;
- A Government company referred to in clause (45) of section 2 of the Act

*Companies (Restriction on number of layers) rules, 2017 dated 20th September, 2017.*

### Circulars

MCA has notified Companies (Indian Accounting Standards) amendment rules, 2016. It is hereby clarified that the holding company, covered by the corporate sector roadmap for implementation of Ind AS, shall follow the corporate sector roadmap and company which has got payment bank or small finance bank as its subsidiary, and then such subsidiary company shall follow the banking sector roadmap prescribed.

*General Circular 10/2017, dated 13th September, 2017.*